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No. 98-275

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In The

Supreme Court of the United States

October Term, 1997

BEAUFORD D. EDDLETON,

Petitioner,

vs.

BOARD OF SUPERVISORS OF HANOVER COUNTY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Beauford D. Eddleton ("Eddleton") requested a temporary injunction, enjoining the County from enforcing the ordinance pertaining to outdoor music festivals, and the Hanover County Circuit Court held a hearing on the matter on July 7, 1994. That injunction request was based on the same facts prompting initiation of this case. At that hearing the Court considered most of the issues raised in this case, and the Court's consideration is reflected in the transcript which is in the record of this case. Following that hearing, the Court granted the County's motion to dismiss. Later in July, 1994, Eddleton filed a Petition for Declaratory Judgment. After consideration of memoranda and argument of counsel, the Hanover County Circuit Court dismissed that petition, by Order dated September 13, 1994.

Eddleton appealed to the Virginia Supreme Court, which reversed the trial court decision and remanded the case to the Circuit Court, by Order dated October 20, 1995. After consideration of the evidence produced at a hearing held on June 13, 1997, a Motion for Entry of a Decree in Favor of the Defendant filed by the County, and argument of counsel, the Hanover County Circuit Court found that the ordinance in question was valid and that outdoor musical events held by Eddleton were not exempt from County requirements, and entered a Final Decree to that effect on June 24, 1997.

Eddleton filed a Petition for Appeal in the Virginia Supreme Court on September 24, 1997. The Virginia Supreme Court denied Eddleton's Petition for Appeal by Order dated December 17, 1997, and denied Eddleton's Petition to Rehear by Order dated February 27, 1998.

The County denies that Eddleton proved that there had been continuous use of his premises for outdoor musical events. The

County denies that Eddleton proved any other circumstances which would render the use of the property for outdoor musical events a "legal nonconforming use." Any representations by counsel in that regard are not accurate.

Eddleton alleges that because a "dance hall permit" was issued by the Hanover County Circuit Court for the "Jamaica Club" in 1963 pursuant to State statutes which have since been amended to provide for regulation by counties rather than the Court, he is exempt from County regulation applicable to "outdoor music festivals." This particular matter was initiated when an advertisement for a "Beach and BBQ Music Party", to be held at the Eddleton property, appeared in the local newspaper and the County Administrator, John F. Berry, sent a letter to Robert D. Eddleton, Secretary/Treasurer of the Hanover Society for the Deaf, Inc., notifying him that a permit was required pursuant to the County's Outdoor Music Festival Ordinance.

Beauford D. Eddleton bought the subject property in 1950. The testimony at trial was that the site in question had been used at various times for a variety of events, including bingo games. The site is improved by buildings and fencing. The proposed event was to include, as a feature of the advertising, musical entertainment in open spaces not within an enclosed structure. Eddleton has not applied for any permits from the County, nor has he applied to the Circuit Court for any "dance hall permit" since 1963.

Any implications in the Petition for Writ of Certiorari that there has been improper enforcement, or that there have been any improper or arbitrary or capricious actions by the County in relation to the ordinance in question have not been proven and are inaccurate.

REASONS FOR DENYING THE WRIT

I.

THE OUTDOOR MUSIC FESTIVAL ORDINANCE INCLUDED IN THE HANOVER COUNTY CODE IS VALID.

The adoption of an ordinance is a legislative action subject to a presumption of validity, to be reviewed by the courts only to determine whether the action was arbitrary and capricious. *Board of Supervisors v. Carper*, 200 Va. 653 (1959). The provisions of the Hanover County Code, Chapter 3, Article III ("the Outdoor Musical Festival Ordinance") (Appendix), are authorized by Va. Code § 15.1-510 (now recodified as § 15.2-1200), conferring general police powers on counties in Virginia. There is no evidence in the record of any invalid or arbitrary or capricious actions.

Although zoning violations on the property are mentioned in the Petition for a Writ of Certiorari, this is not a case involving the Hanover County Zoning Ordinance. The matter of zoning was not before the State courts. The County Administrator's notification to Eddleton related only to the permit required for an outdoor music festival.

II.

THERE IS A REASONABLE BASIS FOR THE DISTINCTION INCLUDED IN THE ORDINANCE BETWEEN A "FAMILY THEME OR RECREATION PARK" AND EDDLETON'S PROPERTY.

The Outdoor Music Festival Ordinance exempts "a family theme or recreation park wherein nonmusical entertainment is

provided on a regular basis", from the ordinance requirements. Eddleton's contention that his site is similar to Paramount-Kings Dominion is baseless, and was proven to be so. Kings Dominion was issued a special exception (zoning permit) for the operation of an "entertainment park" in 1972, as evidenced by letters of County officials which are part of the record of this case. The record reflects that Kings Dominion maintains an extensive complex of entertainment areas, including water rides, roller coasters, and indoor staged events, in addition to sponsoring several outdoor concerts in the summer. The distinction set out in the ordinance has a rational basis, both in theory and in application to Eddleton's property. *Kisley v. City of Falls Church*, 212 Va. 693 (1972).

The testimony of Hester Braxton, Security Manager at Kings Dominion, in the Hanover County Circuit Court, established the distinction between Kings Dominion and the site owned by Eddleton. There is a considerable difference between a property improved by a building and some fence topped by barbed wire (as is the Eddleton property), and Kings Dominion. The exemption for theme parks, about which Eddleton complains, is founded in the factual differences established by the witnesses at trial.

III.

THE ISSUANCE OF A "DANCE HALL PERMIT" BY THE HANOVER COUNTY CIRCUIT COURT DID NOT ADDRESS COMPLIANCE WITH THE COUNTY'S REQUIREMENT FOR A PERMIT FOR AN OUTDOOR MUSIC FESTIVAL.

Eddleton has no "vested rights" pursuant to a "dance hall permit" issued pursuant to authority of a repealed statute, for an outdoor music festival. Former Va. Code § 18-315 defined

a dance hall as "any place open to the general public where dancing is permitted to which an admission fee is charged or for which any compensation is received. . . ." That definition does not coincide with the Hanover County Code definition of an outdoor music festival, which regulates activities including music but not necessarily dancing. Establishment of a vested right requires, at a minimum, continuous activity over a period of time, with substantial investment, in reliance on government action or authorization. *Knowlton v. Browning-Ferris*, 220 Va. 571 (1979). The Eddleton property has not been used continuously as a music festival site, nor has a permit ever been issued for such a use. The former statutes provided for revocation of permits, and there was no evidence that Eddleton's permit was not revoked. (Counties in Virginia are now authorized to regulate dance halls pursuant to Va. Code § 18.2-433. Circuit courts in Virginia no longer regulate dance halls.)

IV.

EDDLETON PROPOSES TO HOLD MUSICAL EVENTS IN AN OPEN SPACE, WITHOUT A PERMIT, IN VIOLATION OF THE ORDINANCE.

The evidence at trial proved that Eddleton's property is not an enclosed structure but is an open space and thus is subject to the permit requirement. The Outdoor Music Festival Ordinance does not refer to a "partially enclosed structure" as being exempt, or to an outdoor area "enclosed by a fence", as one might describe portions of the subject property, as constituting an "enclosed structure." The finding of Judge Leadbetter in the related case of July, 1994, *Hanover Society for the Deaf v. Board of Supervisors of Hanover County*, Chancery No. 268-94, was made a part of the record in this case. (Appendix, Record No. 94-2116, Supreme Court of Virginia, page 62). That record reflects the finding that the

proposed event is an outdoor event. The portions of the subject property proposed by Eddleton as the site for the outdoor music festival are improved by screened areas, board fences with gaps, and chain link fences. Those improvements do not constitute "enclosed structures."

CONCLUSION

The record in this case reflects a reasonable basis for the distinction between Eddleton's property and Paramount-Kings Dominion theme park, reflects no impropriety in application of the outdoor music festival permit requirements to Eddleton by Hanover County, and for these reasons and others stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — STATUTORY PROVISIONS INVOLVED

ARTICLE III. OUTDOOR MUSICAL OR ENTERTAINMENT FESTIVALS*

DIVISION 1. GENERALLY

Sec. 3-36. Definition.

For the purposes of this article, the term "musical or entertainment festival" or "festival" shall mean and include any gathering of groups or individuals for the purpose of listening to or participating in entertainment which consists primarily of musical renditions conducted in open spaces not within an enclosed structure; provided, however, that any such gathering conducted within the confines of a family theme or recreation park, wherein nonmusical entertainment is provided on a regular basis, shall not be considered a "musical or entertainment festival" within the meaning hereof.
(Code 1964, § 10A-2; Ord. No. 80-15, § 1, 6-25-80)

Sec. 3-37. Purpose of article.

This article is enacted pursuant to section 15.1-510 of the Code of Virginia for the purpose of providing necessary regulation for the conduct of musical or entertainment festivals, in the interest of the public health, safety and welfare of the citizens and inhabitants of the county.
(Code 1964, § 10A-1)

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* Cross reference—Operation of sound-producing devices in places of public entertainment or assembly, § 16-9.

Sec. 3-38. Violations of article.

Any person who violates any provision of this article shall be guilty of a Class 1 misdemeanor. Each such violation shall constitute a separate offense. The board of supervisors may bring suits or actions in the circuit court of the county to restrain, enjoin or otherwise prevent a violation of this article. This section shall not be deemed exclusive of all rights or remedies available to the board, but only in addition thereto.
(Code 1964, § 10A-8)

Cross reference — Penalty for Class 1 misdemeanor, § 1-11.

Sec. 3-39. Time limits on entertainment.

Music shall not be rendered nor entertainment provided at a festival for more than eight (8) hours in any twenty-four (24) hour period, such twenty-four (24) hour period to be measured from the beginning of the first performance at such festival.
(Code 1964, § 10A-5)

Sec. 3-40. Minors not to be admitted to certain festivals; exception.

No person under the age of eighteen (18) years shall be admitted to any musical or entertainment festival at which alcoholic beverages are sold, dispensed or consumed, unless such person is accompanied by a parent or guardian, the parent or guardian to remain with such person at all times.
(Code 1964, § 10A-6; Ord. No. 80-11, § 1, 4-23-80)

Secs. 3-41–3-50. Reserved.

DIVISION 2. PERMIT

Sec. 3-51. Required.

No person shall stage, promote or conduct any musical or entertainment festival in the unincorporated areas of the county, unless there shall have been first obtained from the board of supervisors a special entertainment permit for such festival.
(Code 1964, § 10A-3; Ord. No. 81-21, 12-23-81)

Sec. 3-52. Application generally.

Application for a permit under this division shall be in writing, on forms provided for the purpose, and filed in duplicate with the county administrator or his designee, at least twenty-one (21) days before the date of the proposed festival. A copy of such application, together with the attached documents, shall be mailed by the county administrator or his designee to each member of the board of supervisors on the day the application is filed.
(Code 1964, § 10A-3; Ord. No. 81-21, 12-23-81)

Sec. 3-53. Plans, statements and other documents to be attached to application.

A permit required by this division shall not be issued, unless the following conditions are met and the following plans, statements, approvals and other documents are attached to the permit application:

Appendix

(1) A copy of the ticket or badge of admission to the festival, containing the date or dates and time or times of such festival, together with a statement by the applicant of the total number of tickets to be offered for sale and the best reasonable estimate by the applicant of the number of persons expected to be in attendance.

(2) A statement of the name and address of the promoters of the festival, the financial backing of the festival and the names of all persons or groups who will perform at the festival.

(3) A statement of the location of the proposed festival, the name and address of the owner or owners of the property on which the festival is to be held and the nature and interest of the applicant therein.

(4) A plan for adequate sanitation facilities and garbage, trash and sewage disposal for persons at the festival. This plan shall meet the requirements of all state and local statutes, ordinances and regulations and shall be approved by the health officer.

(5) A plan for providing food, water and lodging for the persons at the festival. This plan shall meet the requirements of all state and local statutes, ordinances and regulations and shall be approved by the health officer.

(6) A plan for adequate medical facilities for persons at the festival, such plan to be approved by the health officer.

(7) A plan for adequate parking facilities and traffic control in and around the festival area, such plan to be approved by the sheriff.

(8) A plan for adequate fire protection. This plan shall meet the requirements of all state and local statutes, ordinances and regulations and shall be approved by the county fire marshal.

(9) A statement specifying whether any outdoor lights are to be utilized and, if so, a plan showing the location of such lights and shielding devices or other equipment to prevent unreasonable glare beyond the property on which the festival is located. This plan shall be approved by the supplier of electrical power.

(10) A statement that no music shall be played, either by mechanical device or live performance, in such a manner that the sound emanating therefrom shall be unreasonably audible beyond the property on which the festival is located.

(Code 1964, §§ 10A-3, 10A-4; Ord. No. 81-21, 12-23-81)

Sec. 3-54. Applicant to grant right of entry to enforce article.

No permit shall be issued under this division, unless the applicant shall furnish to the board of supervisors written permission for the board, its lawful agents or duly constituted law-enforcement officers to go upon the property at any time for the purpose of determining compliance with the provisions of this article.
(Code 1964, § 10A-7)

Sec. 3-55. Issuance or denial.

The board of supervisors shall act on an application for a permit under this division within ten (10) days from the filing of the same. If granted, the permit shall be issued in writing, on a form provided for the purpose, and mailed by the county administrator or his designee to the applicant at the address indicated. If denied, the refusal shall be in writing and the reasons for such denial stated therein and mailed by the county administrator or his designee to the applicant at the address indicated.
(Code 1964, § 10A-3; Ord. No. 81-21, 12-23-81)

Sec. 3-56. Revocation.

The board of supervisors shall have the right to revoke any permit issued under this division upon noncompliance with any of the provisions and conditions of this article.
(Code 1964, § 10A-7)

Secs. 3-57–3-70. Reserved.